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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
EAC 01 229 56or
Washington, D.C. 20536

[redacted]

28 JUN 2002

File: EAC 01 229 56073 Office: Vermont Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director,
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is December 19, 1997. The beneficiary's salary as stated on the labor certification is $18.60 per hour or $38,688.00 per annum.

Counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return. The federal tax return for fiscal

year May 1, 1997 through April 30, 1998 reflected gross receipts of $289,993; gross profit of $112,436; compensation of officers of $51,000; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of $8,465. The federal tax return for fiscal year May 1, 2000 through April 30, 2001 reflected gross receipts of $333,862; gross profit of $142,712; compensation of officers of $69,500; salaries and wages paid of $28,045; and a taxable income before net operating loss deduction and special deductions of -$1,523.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that:

> The INS' analysis of the fiscal 1997 & 2000 federal tax returns is invalid because on the 2000 tax return lines 12 & 13 add up to $69,500- and $28,045 to a figure of $97,545- and is the "actual" amount of wages and salaries, rather than "accrual" paid by the petitioner. (See excerpt on business income definition, attached). The taxable income on line 30 is a negative number based on the maximum, legally allowed deductions by the Internal Revenue Service of $197,380- (lines 12 through 26, added) and utilized by the petitioner as an accepted and expedient business practice.

Counsel's argument is not persuasive. The petitioner's Form 1120 for fiscal year May 1, 1997 through April 30, 1998 shows a taxable income of $8,465 and Form 1120 for fiscal year May 1, 2000 through April 30, 2001 shows a taxable income of -$1,523. The petitioner could not pay a proffered wage of $38,688 a year out of a these figures.

Accordingly, after a review of the federal tax returns submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.